Pembinaan KSY Sdn Bhd v Syarikat Federal Furniture Construction and Engineering Works

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 64 OF 1988
HARUN HASHIM, AJAIB SINGH AND JEMURI SERJAN SCJJ
20 DECEMBER 1990

Civil Procedure — Judgment on admission of facts — Counterclaim — Affidavit evidence — Rules of the High Court 1980, O 27 r 3

In this case the respondents were appointed as subcontractors by the appellants to manufacture furniture for a hotel in Kuala Lumpur which was under construction. The respondents claimed that they had completed a certain portion of the works for which the architect concerned had issued certificates of interim payments. The appellants in their defence had claimed that the certificates had been superseded by another interim certificate issued by the architect. The respondents applied for judgment based on a letter by the appellants addressed to the owners of the hotel building admitting the claim of the respondent under the three certificates. The learned senior assistant registrar dismissed the claim of the respondents but on appeal the learned judge of the High Court reversed the decision of the senior assistant registrar and ordered judgment for the sum claimed in favour of the respondents. He also dismissed the counterclaim of the appellants. The appellants appealed.

Held, dismissing the appeal:

(1) On the evidence before the learned judge it cannot be said that he had come to any perverse finding and the court agreed that the respondents were entitled to judgment under O 27 r 3 of the Rules of the High Court 1980.

(2) The counterclaim of the appellants ought not however to have been dismissed out of hand merely on affidavit evidence. Their counterclaim should go for trial.

[Bahasa Malaysia summary

Di dalam kes ini responden telah dilantik sebagai subkontraktor oleh perayu bagi membuat perabut untuk sebuah hotel yang sedang dibina di Kuala Lumpur. Responden mendakwa bahawa ia telah menyelesaikan sebahagian kerja-kerja itu dan arkitek telah mengeluarkan surat-surat perakuan pembayaran sementara. Perayu di dalam pembelaannya telah mendakwa bahawa surat-surat perakuan itu telah diganti oleh suatu lagi surat perakuan sementara yang dikeluarkan oleh arkitek itu. Responden memohon mendapat penghakiman atas alasan surat perayu yang dialamatkan kepada pemunya hotel itu di mana ia telah mengaku benar tuntutan responden di bawah tiga surat perakuan itu. Yang arif penolong kanan pendaftar telah menolak tuntutan responden itu. Akan tetapi apabila rayuan dibuat, yang arif hakim Mahkamah Tinggi telah mengakaskan keputusan penolong kanan pendaftar itu dan memberi penghakimannya bagi pihak responden untuk mendapat jumlah yang dituntut. Beliau juga menolak tuntutanbalas perayu. Perayu telah membuat rayuan.

Diputuskan, menolak rayuan itu:

(1) Berdasarkan keterangan di hadapan yang arif hakim itu tidak boleh dikatakan beliau telah membuat keputusan yang menyalahi undang-undang dan mahkamah bersetuju responden berhak mendapat penghakiman di bawah A 27 k 3 Kaedah-Kaedah Mahkamah Tinggi 1980.

(2) Tuntutanbalas perayu seharusnya tidak ditolak begitu sahaja atas keterangan afidavit. Tuntutanbalas itu hendaklah dibicarakan.]

Legislation referred to
Rules of the High Court 1980 O 27 r 3

Appeal from: Suit No C23-2760-86 (High Court, Kuala Lumpur)

PS Gill for the appellants.
Lim Kean Chye (*YT Ling* with him) for the respondents.

Cur Adv Vult

Ajaib Singh SCJ (delivering the judgment of the court): This is an appeal against the decision of the High Court whereby it had allowed the plaintiffs'/respondents' appeal with costs against the order of the senior assistant registrar who had dismissed the plaintiffs'/respondents' application to enter judgment on admissions of fact under O 27 r 3 of the Rules of the High Court 1980. The High Court also dismissed the counterclaim by the appellants/defendants with costs.

Order 27 r 3 reads as follows:

> Where admissions of fact are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the Court for such judgment or order as upon those admissions he may be entitled to without waiting for the determination of any other question between the parties and the Court may give such judgment or make such order on the application as it thinks just. An application for an order under this rule may be made by summons.

The plaintiffs/respondents (Syarikat Federal Furniture Construction and Engineering Works) were appointed as subcontractors by the defendants/appellants, Pembinaan KSY Sdn Bhd (the main contractors), to manufacture furniture for Hotel Plaza in Kuala Lumpur which was under construction. The owners of the hotel are Lian Seng Properties Sdn Bhd. In their statement of claim the plaintiffs/respondents averred, inter alia, that:

> By a subcontract in writing dated 17 February 1986 made between the defendant and the plaintiff the defendant engaged the plaintiff to design, supply and install wardrobe and kitchen cabinet complete with equipment and accessories to Apartment Block for the proposed Kuala Lumpur Plaza for Lian Seng Properties Sdn Bhd at the price of ringgit one million five hundred and twenty five thousand (M$1,525,000) or such sums as shall become payable thereunder at the times or in the manner specified therein.
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> The plaintiff has completed certain portion of the works for which the architect concerned has issued three certificates of interim payments details whereof are as follows —

Certificate No	Dated	Amount Due
29	6/11/1985	M$139,500
30	28/11/1985	M$241,850
31	26/12/1985	M$187,400
	Total	M$568,750

Pursuant to cl 11(b) of the contract it is expressly provided that the defendant shall within 14 days of the receipt of the Progress Certificate Payment (hereinafter called, 'the said certificates') from the architect shall pay to the plaintiff the amount therein specified in respect of the said work.

In breach of the paragraph abovementioned the defendant has failed or neglected to pay the sum of M$568,750 being the total amount due under the aforementioned certificates of interim payments Nos 29, 30 and 31.

It is a customary practice that interest shall be calculated on overdue accounts payments. The defendant is indebted to the plaintiff in the sum of M$67,958.61 being the interest rate on overdue accounts payments at the rate of 14.5% per annum.

In their statement of defence and counterclaim the defendants/appellants denied the claim and averred, inter alia, as follows:

that the aforesaid certificates Nos 29, 30 and 31 have been superceded by an interim certificate No 40 dated 21 January 1987 issued by the architect of the main contract;

that certificate No 40 had drastically deducted certificates Nos 29, 30 and 31 by a total sum of M$302,520;

that by several progress payments, advances made by the plaintiffs direct payment by the employer Messrs Lian Seng Properties Sdn Bhd and the security deposit and/or performance bond as provided for under the subcontract the total sum (which is denied) due to the plaintiffs is in the sum of M$18,680 only;

that the defendants forwarded several letters to the plaintiffs requesting them to remedy all defects, shrinkage or other faulty works but despite the aforesaid the plaintiffs have failed, refused and/or neglected to remedy the same;

that despite the fact that the plaintiffs have failed, refused and/or neglected to remedy the abovementioned errors the defendants did vide their letter dated 17 February 1987 forward the said sum of $18,680 to the plaintiffs vide a United Malayan Corporation cheque serial No 141600 but the same was returned by the plaintiffs;

that in view of the aforesaid premises the defendants are not obliged in law or in fact to make payment toward the plaintiffs in respect of interim certificates Nos 29, 30 and 31.

In their counterclaim they claimed special damages in the sum of $369,000 as liquidated damages plus general damages for breach of contract:

In accordance with the terms of the subcontract the plaintiff was obliged to complete the works within the stipulated period unless there is an extension of time granted by the architect employed under the main contract.

In breach of the subcontract the plaintiff has failed, refused and/or neglected to proceed with its works and further wrongfully wholly suspended the carrying out of the said subcontract works.

In further breach of the subcontract the plaintiff have failed, refused and/or neglected to proceed with the defect, shrinkage and faulty works as stipulated in the subcontract.

In accordance with the subcontract the defendant did notify the plaintiff to proceed with the balance works of the subcontract failing which the defendant would determine the employment of the plaintiff.

The plaintiff had on 27 March 1987 obtained an ex parte injunction refraining the defendant from appointing a new subcontract and were thus prevented from mitigating its losses and to honouring its obligations both under the main contract and to other subcontractors.

The said injunction was only dissolved on 6 May 1987.

The defendants have suffered loss and damages from the breach of contract by the plaintiff and damages resultant from the injunction.

Wherefore the defendants pray for —

(i) special damages in sum of M$369,000 being liquidated and ascertained damages under the contract;
(ii) general damages for breach of contract;
(iii) an inquiry as to damages pursuant to the injunction;
(iv) interest at the rate of 14% from the date of wrongful suspension of work to date of judgment;
(v) interest at the rate of 8% from date of judgment to date of realization.

On 2 July 1987 the plaintiffs/respondents applied for judgment under O 27 r 3 of the Rules of the High Court 1980 based on a letter dated 3 July 1986 by the defendants/appellants addressed to Lian Seng Properties Sdn Bhd — the owners of the building — admitting the plaintiffs/respondents claim under the three certificates Nos 29, 30 and 31. Earlier by letter dated 27 June 1986 the plaintiffs/respondents had complained to Messrs Lian Seng Properties Sdn Bhd that the defendants/appellants had failed to pay the sums mentioned in the three certificates:

The contractor, Messrs Pembinaan KSY Sdn Bhd, have failed to pay us the sums in respect of the work executed by us and certified in the Architects Certificate Nos 29, 30 and 31 of sums $139,500, $241,850 and $187,400 respectively. These payments are more than five months overdue.

A copy of this letter was sent to Pembinaan KSY Sdn Bhd — the defendants/appellants. It was in response to this letter that the defendants/appellants wrote to Messrs Lian Seng Properties Sdn Bhd on 4 July 1986 referring to the letter of the plaintiffs/respondents dated 27 June 1986. In this letter of 4 July 1986 to Lian Seng Properties Sdn Bhd the defendants/appellants said: 'We refer to Messrs Federal Furniture AR registered letter dated 27 June 1986 addressed to you and a copy extended to us and which contents are pertaining to their application for direct payments from you for the amount due under the various architects certificates of payment Nos 29, 30 and 31. We wish to put on record that our inability to pay the outstanding payments to the nominated subcontractor is as a result of your failure to honour the progress payments certificates duly'.

It was based on this letter of 4 July 1986 by the defendants/appellants to Lian Seng Properties Sdn Bhd that the plaintiffs/respondents applied for judgment under O 27 r 3.

The learned senior assistant registrar dismissed the plaintiffs/respondents application for judgment under O 27 r 3. But on appeal to the learned judge the decision of the senior assistant registrar was reversed and judgment was ordered to be entered in favour of the plaintiffs/respondents for the sum claimed in the statement of claim plus interest and costs. The learned judge also ordered that the counterclaim of the defendants/appellants be dismissed with costs.

These orders by the learned judge were made on 3 February 1988 from which the present appeal has been brought before us.

On appeal the learned judge was not impressed by certificate No 40 which was issued a little over a year after the earlier three certificates Nos 29, 30 and 31 had been issued. In refuting the defendants/appellants' contention that certificate No 40 had amended the earlier three certificates by the architect, the learned judge stated that it was not clarified as to how the amendments could contradict the admission by the defendants/appellants in their letter of 4 July 1986 to Messrs Lian Seng Properties Sdn Bhd. His Lordship referred to Hudson, *Building Engineering Contracts* (4th Ed) at p 694 that 'an architect cannot unilaterally repudiate or invalidate the initial certificate'. The learned judge in his grounds of judgment referred to cl 11(b) and cl 11(e) of the subcontract and said:

> Under cl 11(b) the contractor should pay the subcontractor within 14 days from receipt of certificate from the architect. Again cl 11(e) states that in the event the contractor fails to make the payments in accordance with cl 11(b) within seven days after giving notice the subcontractor can suspend execution of the subcontract works until the payments are made and the period during which the works are so suspended will be considered as extended period to the stipulated period of the completion of the contract. The interpretation which must be given to cl 11(e) therefore is that during the period the suspension is in force the contractor is not permitted to take another subcontractor to carry on the suspended works; if not, the said clause does not make any sense because it is clear that the object of this clause is to compel the contractor to pay his subcontractor when the architect has already given his certificate. If the defendants have admitted that the payments have not been made, it is clear that the plaintiffs are entitled to stop works until the said payments are made.

Clause 11(b) and clause 11(e) read as follows:

> '11(b) Within fourteen days of the receipt by the contractor of any certificate or duplicate copy thereof from the architect the contractor shall notify and pay to the subcontractor the total value certified therein in respect of the subcontract works and in respect of any authorized variations thereof and in respect of any amounts ascertained under cl 8(c) hereof less ...
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> (i) Retention money, that is to say the proportion attributable to the subcontract works of the amount retained by the employer in accordance with the main contract; and
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> (ii) The amounts previously paid.
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> 11(e) If the contractor shall fail to make any payment to the subcontractor as hereinbefore provided and such failure shall continue for seven days after the subcontractor shall have given the contractor written notice of the same then the subcontractor may (but without prejudice to any other right or remedy) suspend the further execution of the subcontract works until such payment shall be made and such period of suspension as aforesaid shall be deemed to be an extension of and be added to the period or periods for completion (as the case may be) as provided in Part II of the Appendix to this subcontract or to any extended period or periods previously authorized under cl 8(b) hereof and shall not be deemed a delay for which the subcontractor is liable under this subcontract.'

On the evidence before the learned judge it cannot be said that he had come to any perverse finding and we agree with him that the plaintiffs/respondents are entitled to judgment under O 27 r 3 of the Rules of the High Court 1980. However we are of the view that the defendants'/appellants' counterclaim ought not to have been dismissed out of hand merely on affidavit evidence. Their counterclaim should go for trial. We accordingly dismiss with costs here and below the appeal against the decision of the learned judge against the defendants/appellants for the plaintiffs/respondents claim of $568,750 and $67,958.61 as interest and direct that the counterclaim be heard on its merits.

Appeal dismissed.

Solicitors: *Gill & Tang; YT Ling & Co.*

Reported by *Prof Ahmad Ibrahim*